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No. 84_____

In the Supreme Court of the United States

October Term, 1984

MICHAEL TOBRINER, et al.,

Petitioner,

vs.

REDEVELOPMENT AGENCY OF THE CITY OF CONCORD,

Respondent.

TO THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Fifth Amendment, covenant rights, constituting building and use restrictions, site plan development allocation and rights of control, of a jointly owned, integrated Shopping Center, taken and released in a condemnation action pursuant to state law are, as development rights, property rights entitling the owners to just compensation.

2. Whether, under the Fifth Amendment, the method of evaluation of these property rights to calculate their fair market value is "what a willing buyer would pay in cash to a willing seller" (United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) for a deed of release, or the uncertain standard of diminution in value of the dominant estates, as decided by the California Court of Appeal.

3. Whether, under the Fifth and Fourteenth

Parties in the case below are Estate of Belloc/Alden and Josephine Jones, William F. Hannon, Arthur Weisberg, Teachers Insurance and Annuity Association, Raymond and Lorraine Choy, and Roger C. On, Inder and Krishna Chabra, Walter and Pearl Wolffs, Mr. and Mrs. George Wu, E. H. and B. J. Holbrook, William J. and M. H. Annissee, Pearley Jacobsen, and Trustee for HMC Division Managers Trust, Anna Garribotti, Frank and D. Polari, Kenlow Corp., Charles and Barbara Bloch and B. and H. Wise, Merle and Merilee Konningsberg, Clifford and Betty Raub, Ali Farazian, Smoot and Meyers Golden, Gordon/Arnold, Imperial Savings and Loan, Steven and Michael Tobriner, Bisso and Highiet.

Amendments, California Health and Safety Code Sections 33368 and 33501, which give a permanent, conclusive presumption to the determination of blight by a local redevelopment agency, thereby allowing condemnation even many years later when conditions have changed, offends due process and the need to assure public use, particularly where commercially valuable development rights are taken from private ownership and transferred by state action to another private, competing corporation.

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NO. 84 _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

MICHAEL TOBRINER, et al.,

vs.

REDEVELOPMENT AGENCY OF THE CITY OF CONCORD

To The California Court of Appeal
First Appellate District

PETITION FOR WRIT OF CERTIORARI

Petitioners, MICHAEL TOBRINER, et al., petition for the issuance of a writ of certiorari to the California Court of Appeal, the First Appellate District, to review the judgment of such court in this case.

OPINIONS BELOW

The judgment of the California Court of Appeal (Appendix A, infra), Redevelopment Agency of the City of

Concord v. Michael Tobriner, et al., is reported at 153 Cal.App.3d 367, 200 Cal.Rptr. 364 (1984). A petition for rehearing by the Court of Appeal was denied on April 27, 1984. Petition for rehearing by the California Supreme Court was denied May 16, 1984. (Appendix B) Remittitur to the Superior Court of Contra Costa County (Appendix C, infra) issued from the Court of Appeal, May 25, 1984.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeal was entered on March 21, 1984. A final decision denying rehearing by the California Supreme Court was filed on May 16, 1984. Thus, the state judgment on the federal constitutional issues of taking and compensation in eminent domain proceedings is final. (North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc., 414 U.S. 156, 163 1973.) This petition for a Writ of Certiorari is timely docketed in the Court within ninety days of final judgment by the highest state court. (28 U.S.C. 2101(c))

The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3). This action arises out of an eminent domain proceeding. At each stage of this case, Petitioners have alleged and asserted their constitutional rights under the Fifth and Fourteenth Amendments, asserting that the property rights taken are compensable, that the method of evaluation must measure up to the fair market standards repeatedly stated by this Court, and that the statutory discretion allowing the Redevelopment Agency to act under a permanent and unreviewable determination of blight is constitutionally offensive to recognized notions of

due process and public use, particularly as applied here. These are questions of federal law of nationwide importance in which the California Court of Appeal is in apparent conflict with applicable decisions of this Court.

The Court has jurisdiction after a final judgment on an issue of law even where remittitur has issued from a Court of Appeal to a lower court for re-trial. United States v. General Motors Corp., 323 U.S. 373, 377 (1975).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

> No person shall ... be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment, United States Constitution:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law ...

The pertinent California statutes are set forth in Appendix D.

STATEMENT OF THE CASE

On May 31, 1978, the Redevelopment Agency of the City of Concord filed a Complaint in Eminent Domain against owners of the Concord Shopping Center in Concord, California. The Agency sought condemnation of "certain easements for parking and other purposes." The owners of the properties comprising the Concord Shopping Center are Petitioners in this case. Condemnation was sought and paid

for by Levitz Furniture Company in order to construct a several-acre warehouse and showroom on an underlying fee it acquired at a tax sale in the center.

At the time it filed the Complaint in Eminent Domain, the Redevelopment Agency filed a Declaration and Order Requesting a Writ of Immediate Possession pursuant to California Code of Civil Procedure Section 1255.410. With payment of a small security deposit, the motion was granted. The Levitz facility has since been constructed and is in operation.

Respondent Redevelopment Agency requested a bifurcated trial on the issue of whether or not there was a proper take under the Fifth and Fourteenth Amendments, as well as Article I, Section 19 of the California Constitution. The constitutional and statutory propriety of the taking issue was heard by the trial court acting as a trier of fact. Prior to testimony, the court preemptorily ruled that "blight" was conclusively presumed and that evidence on that issue would be not allowed.

On the issue of compensation, heard before a jury, the Redevelopment Agency moved to strike the testimony of Petitioners' appraiser as not based on a proper theory of valuation as a matter of law. The trial court, however, refused to strike the testimony.

The jury was instructed to separately value each of the losses to the owners. By an eight-to-four verdict, the jury determined the loss to the owner's fee interests was $746,933.00. Notice of Entry of Judgment was filed on October 15, 1980.

Following the jury trial, and Entry of Judgment on the

Verdict, Respondent Agency filed a Notice of Intention to Move for a New Trial under California Code of Civil Procedure Section 657 on grounds of error at law, occurring at trial, and excepted to by Respondent.

After hearing on the post-trial motion, the trial court granted the Motion for New Trial on the ground of error at law in allowing valuation evidence of the owners' appraiser to go to the jury, because as a matter of law the court considered the approach used by the owners' appraiser in evaluating the rights taken unlawful under Hemmerling v. Tomlev, 67 Cal.2d 572, 63 Cal.Rptr. 1 (1967), a California Supreme Court case involving appraisal of an appurtenant easement.

Petitioners filed an appeal for a reinstatement of the jury verdict and the Redevelopment Agency cross-appealed. The Court of Appeal affirmed the decision of the trial court in all respects in its decision filed March 21, 1984, and certified for publication. Petitioners' motion for rehearing was denied on April 24, 1984. Petition for Hearing by the California Supreme Court was denied without comment on May 16, 1984.

In the opinion for which review is now petitioned, the Court of Appeals held that the property rights taken here were building and site restrictions, covenantal rights to control the building, use and management of all parcels within the Concord Shopping Center, as well as the incidental parking easements over the servient parcel. The Court affirmed the compensability of both covenant and easement rights in condemnation, following the lead of the California Supreme Court in Southern California Edison Co. v. Bourgerie, 9

Cal.3d 169, 107 Cal.Rptr. 76 (1978).

The California Supreme Court in Southern California Edison Co. v. Bourgerie, supra, involving the compensability of taking the benefit of a single-use building restriction, however, did not specifically discuss and set forth a proper method of evaluation of the multiple covenants taken.

In the instant case, the covenants involve comprehensive building, use and site control restrictions, as well as management agreements, amounting to extremely valuable commercial development rights reserved exclusively to the owners of the Shopping Center. By pooling and mutually relinquishing those rights, the owners are entitled to jointly construct new, valuable commercial buildings and/or sell the development rights to third parties who can then construct.

The Court of Appeal, while acknowledging the compensability of these rights in condemnation, virtually equated them with appurtenant easements in holding that the only method of valuation permitted is by separately assessing the diminution (if measurable) of the market value of each dominant estate. The measurement of this decrease, the Court held, must be derived from an appraisal of the value of the dominant estate before and after the taking. The Court then cited as authority only cases involving easements appurtenant (United States v. Welch, 217 U.S. 333 (1910); Hemmerling v. Tomlev, 67 Cal.2d 572, 575 (1967); Yuba County Water Agency v. Ingersoll, 45 Cal.App.3d 452, 455 (1975); People ex rel. Dept. of Public Works v. Logan, 198 Cal.App.2d 581, 586 (1961). But reciprocal parking easements are completely different from covenants. Whereas easements appurtenant may be

appraised in condemnation by diminution of the value of the dominant tenements, covenants are valued at fair market price by the only way they can be transferred, voluntarily or involuntarily, in property law, namely, by the value of a deed of release. The real, constitutional measure of value of these comprehensive development rights is "what a willing buyer would pay in cash to a willing seller" (United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979), quoted in Kirby Forest Industries, Inc., v. United States, 104 S.Ct. 271, 78 L.Ed.2d 253, 52 U.S. Law Week 4607, 4610 (1984), for a deed of release of the development rights. The California Court of Appeal erred in equating the two entirely different kinds of rights taken, and denied Petitioners just compensation under the Fifth Amendment by restricting the method of appraisal. By following the Agency's appraisal method, the owners would be collectively deprived of rights valued at near $1 million.

The value of covenants as enforceable agreements running with the land is the benefit they entail for their owners to control the future use of burdened property. In the commercial context of a cooperative, integrated shopping center, these rights are far more valuable than the limited uses involved in the appurtenant, reciprocal parking easements. These covenants form the legal and financial backbone of the Center as a viable marketing entity. They should be separately appraised in condemnation as commercially valuable development rights over the scope of the burdened parcels, as the Petitioners' appraiser did and as the jury in the trial below correctly understood.

The Court of Appeal stated that the fact that

individual owners of businesses in the Shopping Center can now no longer develop and expand their places of business as they wish after the imposition of the huge Levitz warehouse into the midst of the Center, is really attributable to local, noncompensable building regulations and ordinances. This response begs the issue of loss in the take. If the Petitioning owners could have controlled and restricted the development of the Levitz facility, as they would have had every right to do under their covenants, they could have developed the entire Center to their mutual advantage and needs. The Concord Redevelopment Agency took the Petitioners' right to control development of the Center, and in so doing took from them the control of their future, the opportunity to expand, develop and take advantage of the market according to their own needs and desires, which rights were theirs exclusively under the covenants taken. The Court of Appeal, in missing the point here, severely denigrates the Petitioners' rights and substantially minimizes their loss in the take. To allow a Redevelopment Agency cavalierly to condemn and vacate all the development and restrictive rights of the owners of a shopping center, to allow the unrestricted construction and operation of a discount furniture warehouse there and then offer a token in recompense, violates every sense of fairness and constitutional guarantee of the integrity of private property.

As to the appealability of the determination of blight made by the Redevelopment Agency here required by state law for ascertainment of public use (Cal. Health and Safety Code Sec. 33320.1), the Court of Appeal let stand the trial

court's conclusive presumption. The Court of Appeal, too, disallowed any discussion of a constitutional sunset on a determination of blight under California Health and Safety Code Sections 33368 and 33501, because there had been no appeal within the first sixty days after the determination had been made, as statutorily required (Cal. Health and Safety Code 33368). The fact is, as the record clearly discloses, the condemnation occurred four years later, under vastly changed conditions, after promises made by the Agency to work with the Shopping Center owners and while the owners themselves were in the process of rehabilitating the Center and negotiating with prospective new tenants. The Court of Appeal, upholding the trial court's decision, cited In re Development Plan for Bunker Hill, 61 Cal.2d 21, 37 Cal.Rptr. 74 (1964) and Sweetwater Valley Civic Ass'n v. National City, 18 Cal.3d 270, 133 Cal.Rptr. 859 (1976). Neither of these cases dealt with the issue of the presence of blight several years after the initial determination of blight had been made. State law permitting a permanent, nonreviewable determination of blight offends the guaranteed due process of law, particularly in the facts of this case. To meet the constitutional requirements of condemnation for public use, the existing statute must be interpreted to require a review of the initial determination of blight if, after several years, evidence is presented to show that circumstances have changed and the blight is no longer present. If such review is not required, there is every danger that Redevelopment Agencies exercising the awesome power of eminent domain will condemn private property no longer for public use but for private gain.

REASONS FOR GRANTING THE PETITION

The controlling issue in this case is the constitutional right to just compensation for property rights taken in condemnation by an agency of the state. This Court decided that the taking of development rights in commercially valuable private property could so severely interfere with the owner's "distinct investment-backed expectations" that it would precipitate a compensable taking under the Fifth Amendment. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). This case presents the Court with a corollary of equally substantial national importance.

It brings to the Court the opportunity to decide the measure of "just compensation" for development rights in a case in which eminent domain was involved. The facts before the Court frame the troublesome rule of compensation in lines in which it can be fairly presented, to paraphrase the observation of the Court in the last session in Kirby Forest Industries, Inc., v. United States, 104 S.Ct. 271, 78 L.Ed.2d 253, fn. 26 (1984). The principle that underlies the mandate of the Fifth Amendment is that, as this Court has frequently reiterated, while most burdens consequent upon government action taken in the public interest must be borne by individual landowners as concomitants of "the advantage of living and doing business in a civilized community" Andrus v.Allard, 444 U.S. 51, 67 (1979), quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting), some are so substantial and unforeseeable, and can so easily be identified and redistributed, that "justice and fairness" require that they be borne by the public as a whole.[1/] These considerations are

as applicable to determining the measure of just compensation as they are to the problem of ascertaining whether a taking has been effected by government action.

The Supreme Court has not set a single standard of how property rights are to be appraised fairly under the Fifth Amendment except in the most general terms. This vacuum of specific legal theory leaves unsettled federal questions arising under the Constitution. As long as it remains unsettled the lower courts are divided, as we will illustrate briefly, and the California courts, if the precedent will stand, may decide the measure of damages for the taking of the rights of real covenants in a way that is clearly erroneous under the standard principle the Supreme Court approved in United States v. 564.54 Acres of Land 441 U.S. 506, 511 (1979), United States v. Miller 317 U.S. 369, 374 (1943), and confirmed in Kirby Forest Industries, Inc. v. United States (52 L.W. 4607, 4610): "What a willing buyer would pay in cash to a willing seller" for these rights.[2/] The method of evaluation of property rights needs plenary reconsideration by the Court as a matter of

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1/ Agins v. City of Tiburon, 447 U.S. 255, 260-262 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-128 (1978); Armstrong v. United States, 364 U.S. 40, 49 (1960); Pennsylvania Coal Co. v. Mahon, 260 U.S. at 413, 415-416; Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L. Rev. 1165, 1214-1224 (1967).

2/ See William E. Arnold Co. v. Carpenters District Council, 417 U.S. 12, 14 (1974); Pittsburg v. Alco Parking Corp., 417 U.S. 369, 371-372 (1974); Pernell v. Southall Realty, 416 U.S. 363, 365 (1974); Davis v. Alaska, 415 U.S. 308, 315 (1974); Zacchini v. Scripps Howard Broadcasting Co., 433 U.S. 562, 565 (1977).

paramount national importance.

If each case must be decided on its own facts, as this Court intimated in the Penn Central Transportation case, at 438 U.S. 123-124, without clear guidance from the Supreme Court, the lack of predictability of the probable outcome of this ruinously costly and protracted litigation produces itself a gross injustice. Petitioners therefore respectfully urge that the Court now devote its attention to this case.

Since the Court's decision in Berman v. Parker, 348 U.S. 26 (1954), authorities have urged a resolution of the apparent conflict between Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) and Mugler v. Kansas, 123 U.S. 623 (1887) on the "taking" and "due process" requirements of the Fifth Amendment in governmental actions in derogation of private property rights.[3/] Justice Brennan's dissenting opinion in San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621 (1981), suggests the resolution is proximate. This case turns on fundamentally similar issues, for the proper measure of damages in eminent domain proceedings depends ultimately on the legal nature of "taking" as a transfer of beneficial interests in property from person to government, or through governmental action to another person or entity. Both the nature of the transfer and the nature of the benefit conferred make this case important enough for the Court to decide to resolve the issue.

The subsidiary issue here presented to the Court

3/ The authorities and urgency of the question are thoroughly discussed by Professor William Stoebuck, San Diego Gas: Problems, Pitfalls and a Better Way, 25 Wash. U.J. Urb. & Contemp. L, 3-42 (1984)

radically bears upon the limitations of judicial deference to legislative determination of public use. The Court had occasion once again to discuss the rule of judicial deference of Berman v. Parker, 348 U.S. 26, 32-33 (1954) in the October, 1983, session in Hawaii Housing Authority et al. v. Frank Midkiff, et al., 104 S.Ct. 2321, ___ U.S. ___ (1984). Whereas the courts may not substitute their judgment for that of the properly authorized legislative agency, surely this Court may subject to constitutional scrutiny state statutes permanently immunizing from judicial review agency determination of "blight" necessary for condemnation for public use, as do California Code of Health and Safety Sections 33368 and 33501. The Supreme Court's cases have repeatedly stated "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937). At some meaningful stage in the course of implementing redevelopment plans, citizens are entitled to a governmental review of decisions for which they bear the unique and sole burden of sacrifice, particularly where the plan itself did not call for specific condemnation and where the taking decision was made only years after the plan was adopted.

Whether viewed as a vehicle for settlement of the law in conflict and national constitutional issues, or as implementation of the time-honored judicial function of doing justice, this case commends itself to review on the merits by this Court.

THE PROPERTY INTERESTS TAKEN IN THIS CASE WERE VALUABLE COVENANTS GIVING THE OWNERS EXCLUSIVE RIGHTS OF CONTROL, MANAGEMENT AND DEVELOPMENT OF THE SHOPPING CENTER

The Concord Shopping Center was built in 1956. Unlike modern single-ownership shopping centers, this Center comprises 23 parcels with as many owners. There are approximately 70 businesses in the Center. With the deed to each parcel in 1956, and incorporated in the deeds by reference, a master Agreement was recorded for the maintenance of the common areas, parking, management expenses of the Center, building and use restrictions and a site plan. (See Appendix E, "Grant of Easements and Parking Agreement and Appendix F, Site Plan) The covenants in paragraphs 3, 10, 11, 12 and 13 of this Agreement are blanket building restrictions, building site location, design, height and use controls. The intent of the covenants is to vest in the parcel owners of the Center exclusive right and authority over the development of the Center. This legal instrument was carefully drafted in 1956 to provide legally enforceable running covenants that fulfill all the requirements of California law for real covenants running with title and give all future Center owners management and development rights over all parcels in the Center. California Civil Code Sections 1462-1468; Riley v. Bear Creek Planning Comm., 17 Cal. 3d 500, 510-511 (1976) Some of the covenants are affirmative; i.e. assessments and maintenance obligations; some are restrictive; i.e. height, design, use and location on site building controls. The covenants, in effect, were intended to be and are comprehensive rights to control development.

Any purchaser of a parcel in the Center could develop that parcel only in accord with these covenants and restrictions. It is important to recognize that the rights of control given by these covenants are property rights in the constitutional sense. Chapman v. Sheridan Wyoming Co., 338 U.S. 621, 626-627 (1956); Southern California Edison Co. v. Bourgerie, 9 Cal. 3d at 172-174, and fns. 3 & 4 . Note also United States v. General Motors Corp., 323 U.S. 373, 377-378 (1945). These rights were never abandoned. They are legally identical with the development rights this Court acknowledged in Penn Central Transportation Co. v. City of New York (supra). (See also Fred F. French Investing Co., Inc. v. City of New York, 39 N.Y. 2d 587, 350 N.E. 2d 381, 385 N.Y.S. 2d 5 (1976)[4]

In 1975, California's eminent domain statutes received extensive revision and recodification (see California Code of Civil Procedure 1230.010, et seq.) As presently defined in California Code of Civil Procedure 1235.170, "'Property' includes real and personal property and any interest therein." The Law Revision Commission comment notes that "Section 1235.170 is intended to provide the broadest definition of property and include any type of right, title or interest in property that may be acquired for public use." Baldwin Park Redevelopment Agency v. Irving, 156 Cal.App.3d 428, 202 Cal.Rptr. 792, 796 (1984). The Concord Shopping Center is a contemporary cooperative merchandising enterprise. The presence and enforceability of the

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4/ Costonis, "Development Rights Transfer: An Exploratory Essay," 83 Yale L.J. 75 (1973); idem., "The Disparity Issue: A Context for the Grand Central Terminal Decision, 91 Harv. L. R. 402 (1977).

property rights in the covenants in this master Agreement were and continue to be vital for the financing, growth and business success of the Shopping Center. Their taking was vital for the construction of the Levitz facility.

In the interests of brevity, Petitioners wish only to point out to the Court the long tradition in our legal system, going back to Pakenham's Case, Y. B. 42 Edw. III, Hil. f.3, pl.4 (1369), or at least to Spencer's Case, 5 Coke 16a, 44 Eng. Rep. 72 (Q.B. 1583) of using and enforcing covenants to protect ownership rights in land.[5] Whether beneficial covenants are violated by private persons or by the state, the loss to the owners is universally compensable. "Equally important," as Justice Mosk stated in Southern California Edison v. Bourgerie, 9 Cal. 3d 169, 107 Cal.Rptr. 76 (1978), "the violation of building restrictions could cause far greater damage in monetary value to a property owner than the appropriation of a mere right of way." (at p.173)

On May 23, 1956, when the original parties executed and recorded the Agreement giving rise to the property rights taken here, they clearly intended to preserve absolute and exclusive control of the entire project in themselves and their successors in title. The covenants played a valuable role, as the Massachusetts Supreme Court said recently in upholding similar covenants, because "they serve a purpose of facilitating orderly and harmonious development for

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5/ See Clark, Covenants and Interests Running With the Land (2d ed. 1947); Browder, "Running Covenants and Public Policy," 77 Mich. L. Rev. 12 (1978); Stoebuck, "Running Covenants: An Analytical Primer," 52 Wash. L. Rev. 86 (1977); Simpson, An Introduction To the History of Land Law, 109-111 (1961); Restatement of the Law of Property 539; American Law of Property 9:24

commercial use." Whitinsville Plaza, Inc. v. Kotseas, 390 N.E. 2d 243, 250; 378 Mass. 85 (1979). No cooperative, integrated shopping center could be financed at that time, let alone attract business tenants except for such an enforceable Agreement.[6] The covenants taken by the Concord Redevelopment Agency were thus clearly reserved development rights. The Court of Appeal simply emasculates these rights by equating them with the single use restrictions in the cases cited. The Concord Redevelopment Agency condemned and vacated multi-faceted, comprehensive covenants to allow Levitz to build a huge warehouse showroom taking up 136,000 square feet of the Center.

A STANDARD OF APPRAISAL FOR PROPERTY RIGHTS TAKEN IN CONDEMNATION SHOULD BE DECIDED BY THE COURT TO RESOLVE CONFLICTING, UNCERTAIN AND UNWORKABLE METHODS OF EVALUATION DIVIDING THE COURTS

Petitioners have asserted all along that, whereas the measure of loss of appurtenant parking easements may be taken from diminution in value of the dominant estates, the loss of the development rights enshrined in the covenants is the value of a deed of release of these rights. Scholarly opinion is uniform.[7] Case law is in disarray, however,

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6/ Tully, "The Shopping Center Lease," California Land Security and Development, 841-931 (1960); Sturtevant, "Restrictive Covenants In Shopping Center Leases," 34 N.Y.U.L. Rev. 940 (1959); 97 A.L.R. 4 (1964); Anderson, "The Mortgagee Looks at the Commercial Lease," 24 Fla.L.R. 484, 496 (1957); Restatement of the Law of Property, 543; 2 Am. Law of Property 9.13(a). See also Green and Smith, Shopping Towns, U.S.A. (1960) and Nicholas, "Setting Up a Shopping Center," California Land Security and Development, 775-839 (1960).

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largely because of fundamental misconceptions in the courts between the exercise of eminent domain and inverse condemnation, between governmental "taking" and "damaging" private property. The Concord Redevelopment Agency took rights of development away from the owners of the Shopping Center in vacating the covenants. The Agency then transferred those rights to Levitz. The property rights transferred benefit of the covenants; their value is what a ready, willing and able buyer would pay for the release of development rights to the subject parcel. This value is substantial, as has been shown by sale of those rights elsewhere on the Center to others. This essentially was the method of appraisal the Petitioner's expert used at trial. The jury in the trial below understood exactly what was at stake in the take. The jury's verdict should never have been overturned.

The exercise of the state's power of eminent domain in condemnation proceedings effects essentially an involuntary, compelled transfer of that bundle of rights tied together in the ownership of property from the private individual to the state, or through the state, to another individual. The exclusive right to erect any buildings over the parcels comprising the Center vested in all the owners of the Center. It was transferred, given and conveyed to Levitz Furniture Company. The key to evaluation is how

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7/ "A release of the restrictions has been compelled, for which a deed of release would have accomplished the same end." Stoebuck, "San Diego Gas: Problems, Pitfalls and a Better Way," 25 Wash. U. J., Urb. & Contemp. L. 3, 38 (1984); idem., "Running Covenants: An Analytical Primer," 52 Wash. L. Rev. 861, 882-885 (1977)

much this right is worth. The question of evaluation in eminent domain proceedings is essentially what is the worth of the property rights an owner has lost in the involuntary taking. United States v. General Motors Corp., 323 U.S. 373, 377-378 (1945); Agins v. Tiburon, 447 U.S. 255 (1980).

The Redevelopment Agency insisted that diminution in market value separately appraised of each of the retained parcels is the only legally acceptable method of evaluation. If there is no present dip in business profits in the Center, or if there have been no sales of these retained parcels at less than their pre-take market value, the Agency reasons the development rights were worthless. This is simply preposterous. "What a willing buyer would pay in cash to a willing seller" for the rights taken is the constitutional norm. "Other measures of 'just compensation' are employed only 'when market value is too difficult to find, or when its application would result in manifest injustice to owner or public..." Kirby Forest Industries, 104 S.Ct. 271, 78 L.Ed.2d 253, fn. 14, quoting United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

The Center owners have lost their own rights to expand and enlarge their own businesses, because the majority of jointly developable space was used up by Levitz and they lost rights to benefit from and control the use of the servient estate. The Fifth Amendment requires a standard of evaluation of property that responds to the question of how much Levitz would have paid the owners for a deed of release of the development rights had there been no state intervention. The owners had development studies conducted by retained experts and had begun negotiations

with private purchasers of those rights prior to the city's condemnation.

The Levitz parcel is now free of the Center owners' rights. In the future the Levitz parcel can be turned to any use conceivable, regardless of the damage that could be done to the other businesses. Levitz has moved into a going shopping center, taken the benefits of the Center, without any of the restrictions and controls. By the condemnation Levitz was released by the state from the Owners integrated, cooperative merchandizing plan. As Justice Tobriner said, dissenting in Riley v. Bear Creek Planning Comm., supra, at 513, 518, "Common sense and substantive justice dictate that (plaintiffs) should not be free to violate such restrictions...To hold otherwise would defeat the actual intent of the parties; it would allow plaintiff to reap the benefits of the 'neighbors' restrictions, while, as to their own lot, they enjoy complete freedom."

Comparables gleaned from market data analysis of the acquisition of development rights on comparably situated vacant properties in the area are commonly used by real estate appraisers to form an opinion of value. This method comports with the constitutional mandate of just compensation. Without state intervention this method of appraisal would have been used in the Petitioners' private negotiations with Levitz. This essentially is how the jury decided the value of the take. Petitioners have successfully negotiated at a fair price the release of development rights to the owner of a nearby similar parcel to allow construction of improvements thereon by the owner of that parcel. The Redevelopment Agency's appraiser conceded that the value

of the take would fit the Owner's method of appraisal if the rights were really development rights; however, the Agency's appraiser argued that the only thing taken was unused parking spaces, of minimal value. He did not think the Center owners could assemble their development rights for sale. In fact, the take occurred precipitously as the owners were doing just that. They had never abandoned their rights.

This Court now has the opportunity to decide legally how the property rights in issue can be justly evaluated. In deciding this issue the Court will have the opportunity to affirm that in condemnation the value of property taken from a private owner and transferred to the State is the proper measure of compensation under the Fifth Amendment, not, as in inverse condemnation, merely the residual damage to a retained dominant estate.

Under the California Evidence Code evaluation statutes for condemnation, Sections 814-820, there is simply no reference to the taking of covenant rights. The California Code of Civil Procedure Section 1263.310 states that:

> Compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken. (Emphasis added).

The rule of highest and best use, established in California in Sacramento R.R. v. Heilborn, 156 Cal. 408, 409, 104 P. 979 (1909), wherein it is stated that fair market value is "the highest price estimated that the property would bring if it were exposed for sale on the open market for a reasonable period of time and if the buyer had knowledge of all uses and purposes for which it was adaptable," is

codified now in the California Code of Civil Procedure Section 1263.320.[8]

The condemned development rights should be evaluated separately, not simply lumped together with reciprocal parking easements. If not, the burden should be on the condemnor to show evidence that the property taken does not have independent marketability and, therefore, it should be valued together with Petitioners' other untaken land. This they could not do.

The state courts are divided and adrift in handling this issue of evaluation under the Fifth Amendment. This case is not unlike Hartford Nat'l Bank and Trust Co. v. Redevelopment Agency of the City of Bristol, 164 Conn. 337, 321 A.2d 469 (1973)

On the other hand, in single-use restriction cases, New Jersey (State Commissioner of Transportation v. Orenstein, 306 A.2d 479, 483 (1979) Wisconsin (Fuller v. Town Board of Town of Bobbison, 193 Wis. 549, 214 N.W. 324 (1927), Nevada Horst v. Housing Authority of County of Scotts Bluff, 166 N.W.2d 119, 121 (1969), Michigan Allen v. City of Detroit, 133 N.W. 317, 320 (1911) and South Carolina School District No. 3 v. County Clerk of Charleston, 127 S.E.2d 625, 627 (1962) have used for appraisement a mathematical calculation of the diminution in market value of the dominant estate with and without the restriction.

The Agency speculated that on the assemblage theory the individual owners would not have agreed to relinquish their rights. Lack of intent to relinquish on the part of the owners, however, does not mean that the development rights

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8/ See Nichols, Eminent Domain, 12.314.

lose their value. The covenantal rights retain their value even while future development is anticipated. Stockton v. Miles & Sons, Inc. (D.C. Cal.) 165 F.Supp. 554 (1958); Wilson v. Abrahms, 1 Cal.App.3d 1030, 82 Cal.Rptr. 272 (1969).

Using general principles of valuation, including determination of fair market value at the highest and best use, as a guiding light, and fairly applying analogies to other property rights, this Court can form a constitutional standard of compensation and determine that Petitioners' method of valuation is legally correct.

THE SUPREME COURT OF THE UNITED STATES SHOULD STRIKE DOWN STATE STATUTES THAT EFFECTIVELY PRECLUDE EFFECTIVE JUDICIAL REVIEW OF THE FUNDAMENTAL CONSTITUTIONAL ISSUES IN THIS CASE

Four state high court decisions since 1979, widely publicized and commented upon, have involved redevelopment agency condemnation of private property to transfer private interests to other private parties for ostensibly public uses and purposes. The Courts have decided them in diametrically contradictory ways. In Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) the Michigan Supreme Court vindicated the public use requirement in a plan by the Detroit Economic Development Corporation to acquire, by condemnation, a large tract of land to be conveyed to General Motors Corporation as a site for construction of an assembly plant.

The appellate opinion Petitioners ask this Court to review cited California Health and Safety statutes 33368 and 33501 peremptorily to preclude admission of any

evidence whatsoever on the issue of public use by Petitioners at any stage of this proceeding. The Michigan Supreme Court clearly stated:

> Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny (emphasis added) the claim that the public interest is the predominant interest being advanced.

Petitioners respectfully submit that the statutes allowing only a 60-day review after the initial decision on blight and then forever precluding substantial judicial scrutiny are unconstitutional, because they simply allow no meaningful scrutiny whatsoever.

Poletown, however, is not the final word. Three other state supreme courts have struck down condemnation proceedings in similar circumstances. In Petition of City of Seattle, 96 Wn.2d 616, 638 P.2d 549 (1981), the Washington Supreme Court ruled that the City's proposed acquisition of a downtown area in order to develop and strengthen retailing activities was not a public use, even though the project might forestall urban decay. In City of Owensboro v. McCormick, 581 S.W.2d 3 (1979), the Kentucky Supreme Court struck down the state's Local Industrial Authority Act to the extent that it gave municipalities the power to condemn private property for reconveyance to private enterprise; "no 'public use' is involved where the land of A is condemned merely to enable B to build a factory or C to construct a shopping center." 581 S.W. 2d at 8. And, in Karesh v. City Council of Charleston, 271 S.C. 339, 247 S.E.2d 342 (1978), the South Carolina Supreme Court held that the city could not condemn land in order to lease it to a private firm for construction of

a convention center and parking facility that would contain retail shops replacing existing retail stores in the area.

The point is that "public use" is quintessentially subject to judicial scrutiny under the Constitution. Statutes making the scrutiny practically impossible are unconstitutional.

As the above-cited, disparate cases amply illustrate, the "taking" issue under the Fifth Amendment is still fundamentally an issue of public use. To paraphrase Justice Brennan's ringing dissent in San Diego Gas, "the express words and purpose of the Just Compensation Clause," (101 S.Ct. 128), 1304-1305 (1981), makes it a command, not a convenience, to find public use at the time of the condemnation.[9] There is no dispute now about the law. All agree that condemnation for a public use is permitted. All agree that condemnation for a private use cannot be authorized whatever its incidental public benefit and condemnation for a public purpose cannot be forbidden whatever the incidental private gain. The heart of this dispute is whether the proposed condemnation is for the primary benefit of the public or the private user.

For the California Courts to have precluded Petitioners' Offer of Proof, that four years after the original determination of blight, after major rebuilding plans had been announced and begun and while the Center owners were in the process of negotiating with new owners for the very parcel in question, there was no longer any blight or public need, was unconstitutional.

9/ See generally, Ross, "Transferring Land to Private Entities by the Power of Eminent Domain," 51 Geo.Wash. L.Rev. 355 (1983).

It is time now for this Court to vindicate the residual constitutional prerogative and duty of the judiciary to scrutinize the public use limitation upon the state in eminent domain.

The Court of Appeal never addressed this constitutional concern. It simply cited a case interpreting the 60-day appellate limitation of California Health and Safety Code Sections 33368 and 33501. Sweetwater Valley Civic Ass'n. v. City of National City, 18 Cal.3d 270, 277 (1976). The record reveals that the trial court allowed no evidence whatsoever of the elimination of blight at the time of the condemnation in the pre-jury stages of this proceeding.

CONCLUSION

As has been clearly illustrated, this case presents to the Court definitional and substantive constitutional issues of paramount national significance. Permeating the case below in the Redevelopment Agency's denigration of the rights taken and their studied reluctance to accord them even minimal market value is the implied notion that it may be too expensive for local governments to follow the Constitution; that government should be permitted to confiscate property rights to transfer those rights from the struggling merchant to the more prosperous entrepreneur. For the state to give a free lunch to new enterprises at the cost of the original owners in the expectation of higher future tax revenues is a spurious constitutional theory long ago rejected as intolerable by this Court.

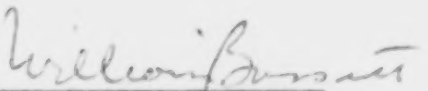
Both the equities of the factual situation here and the national need for clarification of the substantive and

evaluative aspects of this litigation commend the intervention of the Court. Petitioners respectfully pray the Court to note probable jurisdiction and grant this petition for writ of certiorari to review and reverse the decision of the California Court of Appeal, in this case.

Dated: August 2, 1984.

Respectfully submitted,

THIESSEN, GAGEN & McCOY
A Professional Corporation

By 
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APPENDIX

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DIVISION, DIVISION THREE

REDEVELOPMENT AGENCY OF THE CITY OF CONCORD,

Plaintiff, Cross-defendant, and Appellant,

v. A013187

MICHAEL TOBRINER et al., 1 Civ. No. 53134

Defendants, Cross-complainants and Appellants. (Super Ct. No. 187464)

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This is an appeal from an order granting a new trial in a condemnation action. The Redevelopment Agency of the City of Concord (the Agency) moved under Code of Civil Procedure section 657 for a new trial on the issue of just compensation. The trial court granted the motion on the ground that it had erred in denying the Agency's motions to strike the valuation evidence proffered by the condemnees.

The owners of the interests condemned (hereafter appellants) also attack as erroneous the trial court's holding that the taking was proper; its granting of nonsuit on their cross-complaint in inverse condemnation; and its failure to consider their request for costs and litigation expenses. The Agency has appealed from the court's order denying judgment notwithstanding the verdict. We affirm in all respects.

I

On May 31, 1978, the Agency filed a complaint in eminent domain against owners, tenants and parties with secured interests in properties in the Concord Shopping Center on Willow Pass Road in Concord (the Concord Center). The property sought to be condemned was described in the Agency's complaint as "parking cross easement interests" held and enjoyed by the owners, tenants, and secured parties in the real property on which the Concord Center is located. The defendant tenants and secured parties did not actively oppose the condemnation action. The appellants here are the owners of the real property on which the Concord Center is built.

The Concord Center was built in or about 1956. Unlike more modern shopping centers, it is not owned by a single individual or entity. Rather, it is in divided ownership, with approximately 23 separate sets of property owners, owning as many parcels. Most of the buildings are leased to persons who operate businesses on the premises. There are approximately 70 different business tenants in all.

The property interests at issue in this case are nonexclusive appurtenant easement rights over an area of real property in the rear parking lot of the Concord Center. These nonexclusive appurtenant easement rights are held by the appellant owners and their tenants pursuant to an easement agreement.

Included within the provisions of the easement agreement are restrictions stating that no buildings, fences or obstructions could be constructed in the parking easement

areas; and that all tenants, subtenants, and customers are entitled to use all of the parking areas at all times on a nonexclusive basis. The easement agreement specifically provides that "All covenants of the parties hereto are expressly declared to be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto, and are and shall be appurtenant to and run with the real property described in Exhibit 'A' hereto and each and every parcel thereof." (Emphasis added.) Each owner's separate parcel includes not only a building site, but appurtenant easement rights for parking purposes in front of and to the rear of the building site. Each such easement is burdened by the nonexclusive reciprocal easements in favor of all the other owners and tenants for parking and for automobile and pedestrian ingress and egress. Thus, each owner and tenant has parking rights over all the parking areas in the Concord Center.

No fee interests are being condemned in this action. The land subject to development was purchased by Levitz Furniture (Levitz) with the encouragement of the Agency, prior to the commencement of this condemnation action. The Agency had previously included the Concord Center within its plans for a downtown Concord redevelopment area, on account of perceived physical and economic deterioration of the Concord Center and the failure of the owners to develop or adequately maintain the rear portion of the Concord Center. This area, which had never been developed because of the inability to obtain the unanimous agreement of the various owners and tenants necessary to eliminate the easements and restrictions on that area, was

underutilized, in bad repair, and not necessary for the parking needs of the Concord Center tenants and owners. The Agency felt that the development of a Levitz store would revitalize the entire Concord Center and eliminate the problems associated with the rear area.

Once it had purchased a fee interest in a portion of the land in the rear area of the Concord Center, Levitz, like the other owners and tenants, obtained the right to park in all parking areas of the Concord Center. But it could not erect any building to house its proposed furniture store on its property, because the land was burdened by the parking easements and building restrictions. Levitz sought to obtain a voluntary agreement with the owners and tenants to relinquish the easements and restrictions over Levitz's parcel. These attempts were unsuccessful, because the required unanimity could not be arranged. The Agency then brought this action to condemn the easements.

II

The central issue before us is the proper method of valuation of the easements and restrictions sought to be condemned. In granting a new trial, the court below ruled that the method employed by the appellant owners' only expert witness was improper, and should not have been admitted in evidence. Appellants contend that the approach used by its expert witness was permissible, and the trial court committed no error in admitting it at trial. We conclude that the method of valuation utilized by appellants was improper, that it should not have been admitted in evidence at trial, and that the trial court was

correct in ordering a new trial.

The well-established legal standard for evaluating an easement requires an analysis of the decrease in value of the dominant estate (or dominant tenement) resulting from the taking of the easement. The measurement of this decrease must be derived from an appraisal of the value of the dominant estate before and after the taking. This approach has been utilized in every reported eminent domain case in the United States involving the condemnation of easements appurtenant, and is the law in California. (United States v. Welch (1910) 217 U.S. 333; Hemmerling v. Tomlev (1967) 67 Cal.2d 572, 575; Yuba County Water Agency v. Ingersoll (1975) 45 Cal.App.3d 452, 455; People ex rel. Dept. of Public Works v. Logan (1961) 198 Cal.App.2d 581, 586; 27 Am.Jur.2d, Eminent Domain, 322, p. 145; Miller & Starr, Current Law of Cal. Real Estate (rev. ed. 1977) Easements, 18:70, pp. 390-391.) The trial court properly ruled in limine that all valuation evidence must be based on a market appraisal of the dominant estates and the diminution in value of each dominant estate, measured separately, as a result of the taking of the easements; and further, that appellants could not base their evidence on the value of the servient estate underlying the easements or the development potential of that land.

The record before this court reveals that appellants ignored the trial court's ruling in limine. Instead, they offered in evidence theories of just compensation utilizing valuation methods and approaches that were based on an evaluation of the beneficial impact of removal of the

easement restrictions on the development potential of the Levitz fee -- that is, the servient estate underlying appellants' easements -- rather than the actual reduction in value suffered by the dominant estates as a result of the condemnation of the easements. Because this evidence was improper, misleading, and incorrect as a matter of law, it should have been excluded.

From the outset, appellants based their claim for compensation on the fee simple value of the servient estate underlying the easements at issue. Appellants' expert, Mr. Floyd Clevenger, first estimated the unencumbered value of this land at $4 per square foot. He then allocated 75 percent of that value (or $3 per square foot) to the surface easement rights belonging collectively to the Concord Center owners, and 25 percent to the owner of the underlying fee (Levitz). Clevenger's own pretrial declarations and statements indicate that this allocation of values between the easements and the servient fee was highly conjectural and speculative, and that it was based on his assumptions regarding the development potential of the property. No foundation was ever offered for this evaluation other than Clevenger's own subjective judgment. Appellants simply multiplied the $3 per square foot figure times the area of the surface easements sought to be taken, as described in the Agency's amended complaint (approximately 136,000 square feet), plus the area claimed by appellants in their cross-complaint in inverse condemnation (approximately 259,000 square feet), to produce a total claimed compensation value of approximately $1,185,000. Finally, this figure was

allocated to the various dominant tenements according to a mathematical formula used by the Concord Center for apportioning operating or maintenance costs.

After preliminary testimony outside the presence of the jury, the trial court reaffirmed its earlier in limine orders, and ruled further that appellants could not use a single gross figure for the value of the easements and allocate that total among the owners on the basis of the Concord Center's formula for apportioning maintenance expenses. Thereafter, at trial before the jury, appellants attempted to recast their evidence in a form that would appear to comply with the court's orders. Thus, Clevenger now testified that his evaluation of appellants' compensation claim was based on an appraisal of the decrease in value of each dominant tenement.

However, appellants' valuation method actually remained unchanged. Appellants never produced any actual appraisal of the estimated value of each dominant estate after the taking of the appurtenant easements. This time, Clevenger simply allocated the same total value estimate that he had used before trial ($1,185,000) among the separate dominant tenements on the basis of land area rather than apportioned operating expense, resulting in a "damage" figure of approximately $0.76 per square foot over the entire Concord Center. On this basis, he generated a "loss" estimate for each dominant estate from his original evaluation of the value of the servient estate. Rather than appraising the value of each dominant tenement before and after the taking and then comparing the two values to determine the actual loss or damage to

the owners, appellants simply turned the procedure on its head by subtracting a predetermined "loss" figure from the appraised pretake value of each dominant tenement to come up with an artificial "after" value for each appellant's parcel. In short, appellants' procedure was the reverse of what the trial court had ordered them to follow.

Although appellants attempt to portray evidence given by their expert at trial as a legitimate evaluation of the diminution in value of each dominant tenement, it is clear that this was not the case. Clevenger admitted on cross-examination that all he had really done was to divide up the predetermined $1,185,000 figure, derived from appraising the unencumbered development potential of the servient fee underlying the easements, among the parcels of the various dominant estate owners. At first, the trial court appeared to give some credence to appellants' assertion that they were presenting evidence of the loss to the dominant tenements; it therefore denied the Agency's repeated motions to strike Clevenger's testimony. After the jury returned a verdict of approximately $750,000 for appellants, the court granted the Agency's motion for a new trial.

A trial court's discretion to grant a new trial is quite broad. (Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal.3d 279, 387.) The record clearly indicates that prejudicial error occurred at trial because the court had allowed the admission of evidence based on an invalid measure of value. (Boston Chamber of Commerce v. Boston (1910) 217 U.S. 189, 195; People v. La Macchia (1953) 41 Cal.2d 738, 754, disapproved on other grounds in County of Los

Angeles v. Faus (1957) 48 Cal.2d 672, 680.) The new trial was therefore properly granted.

III

Appellants next argue that the interests at issue here are not merely parking easements, but are restrictive covenants or equitable servitudes giving them the right to control the development, use and operation of the servient tenement. Thus they contend that valuation based on the benefit to the servient tenement was proper here. However, courts in condemnation cases use the same method of valuation for restrictive covenants and equitable servitudes as they employ for appurtenant easements.

In Southern Cal. Edison Co. v. Bourgerie (1973) 9 Cal.3d 169, 172-175, the Supreme Court held that a building restriction in a deed constituted property, and that the owner of the dominant tenement was entitled to compensation for termination of the restriction by a condemnor exercising the power of eminent domain over the servient tenement. (Cf. Riley v. Bear Creek Planning Committee (1976) 17 Cal.3d 500, 510, 511.) The court's discussion of its holding in Bourgerie makes clear that the loss to be compensated when such a building restriction is taken is the damage to the property of the landowner entitled to enforce the restriction. The court pointed out that the amount of damage to the owners of the restriction would vary from substantial to negligible, depending on such variables as the character of the improvement to be made on the property subject to restriction (e.g., parks or access roads versus schools or fire stations); and the

proposed improvement's proximity to or distance from the property of the owner of the restriction. (Bourgerie, supra, 9 Cal.3d at p. 174.) "A condemner need only selectively join in the action landowners whose property is most likely to be damaged by the violation of the building restriction; there are other remedies for excluded owners who anticipate the improvement will result in damage to their property." (Id., at pp. 174-175, emphasis added.)

The court in Bourgerie cited and relied upon cases in other jurisdictions uniformly holding that the applicable measure of damages for the condemnation of restrictive covenants or equitable servitudes is the same as that used for evaluating an easement appurtenant: the depreciation in the fair market value of the dominant tenement, measured before and after the taking. (Id., at p. 172; Horst v. Housing Auth. of County of Scotts Bluff (Neb. 1969) 166 N.W.2d 119, 121; Meredith v. Washoe County School District (Nev. 1968) 435 P.2d 750, 752-753; United States v. Certain Land in City of Augusta, Maine (D.Me. 1963) 220 F.Supp. 696, 700-701; School District No. 3 v. Country Club of Charleston (S.C. 1962) 127 S.E.2d 625, 627; Town of Stamford v. Vuono (Conn. 1928) 143 A. 245, 249; Allen v. City of Detroit (Mich. 1911) 133 N.W. 317, 320.

In short, whether they are called restrictive covenants, equitable servitudes, or easements, the interests at issue in this case are property interests in the constitutional sense. (Chapman v. Sheridan-Wyoming Co. (1950) 338 U.S 621, 626-627; Southern Cal. Edison Co. v. Bourgerie, supra, 9 Cal.3d at pp. 172-174, & fns. 3, 4.)

When such interests are taken by eminent domain, the owner of the land for whose benefit the restrictions were imposed is entitled to compensation for damage to the dominant estate, measured by the diminution in value of that property as a result of the taking.[1/]

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1. Appellants cite two cases for the proposition that the measure of compensation for restrictive covenants is the diminution in value of the servient tenement, as measured by the difference between the restricted and unrestricted value of that property. (Hartford Nat. B. & T. Co. v. Redevelopment Agcy., etc. (Conn. 1973) 321 A.2d 469; Herr v. Board of Education (N.J.Ct. Err. & App. 1912) 83 A. 173.) These cases are completely inapposite to the issue before us and distinguishable from the facts of this condemnation. In Hartford, the court was considering the value to be given an easement in gross: that is, one without any specific property for whose benefit the easement was created. Unlike in our case, there was no dominant tenement or benefited property to be considered in Hartford. An easement in gross exists independently of the ownership or possession of any specific land, and constitutes a personal right to use the land of another. (Hartford, supra, 321 A.2d at pp. 471-472; Rest., Property, 453, 454.) The method of evaluating compensation for condemnation of an easement in gross is different from that used for easements appurtenant such as are involved in the instant case; the approach taken in Hartford is sanctioned by the Restatement of Property for easements in gross, and is similar to the approach of California cases for such interests. (Rest., Property, 507, 508; 3 Miller & Starr, Current Law of Cal. Real Estate, Easements, supra, at pp. 390-391; County of Los Angeles v. Wright (1951) 107 Cal.App.2d 235, 236-241.) The other case cited by appellants, Herr v. Board of Education, concerned the condemnation of property in fee which was subject to building restrictions, and is distinguishable on its facts from the instant case. In any event, it has been limited by subsequent New Jersey cases, and is not in keeping with any of the more recent decisions on the question of compensation of building restrictions. (State, Commissioner of Transportation v. Orenstein (N.J. Super. Ct., App. Div. 1973) 306 A.2d 479, 483.)

IV

Turning to the issue of whether the taking itself was proper as a matter of law, we find no reason to reverse the decision of the trial court. The findings of public use, necessity and blight were all supported by substantial evidence. With regard to public use and necessity, appellants' assertion that the development of the Levitz facility does not conform to the Agency's redevelopment plan does not bear scrutiny (Redevelopment Agency v. Herrold (1978) 86 Cal.App.3d 1024, 1029-1031.) And as to blight, appellants' failure to challenge the blight finding within 60 days bars their subsequent challenge in this condemnation action. (Health & Saf. Code, 33368, 33501; Sweetwater Valley Civil Assn. v. City of National City (1976) 18 Cal.3d 270, 277.)

V

Appellants cross-complained below, seeking compensation for the alleged "taking" of certain portions of land in the Concord Center in inverse condemnation. The trial court granted the Agency's motion for nonsuit on this cross-complaint. There is no merit to appellants' contention of error in this regard. The determination of whether an inverse taking has occurred is a nonjury question, even when there are factual questions involved. (Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit District (1978) 80 Cal.App.3d 863, 868.) The evidence in the record clearly shows that, with respect to the portions of the Concord Center for which appellants claim compensation in inverse condemnation (the inverse area), appellants retained all cross-easements rights after

the taking that they had beforehand.

Appellants' theory is apparently based on the theory that Levitz "used up" parking spaces in the construction of its building, and those parking spaces are no longer available to the other owners should they choose to expand their own structures or collectively develop the rest of the Concord Center. However, appellants' own appraiser admitted that there was ample parking available in the Concord Center after the construction of Levitz's facility, and that the loss of parking did not prevent any appellants from developing buildings on their parcels to the fullest extent permitted under the Concord Center's own restrictions and the zoning and building regulations of the City of Concord. The witness also conceded that none of the existing buildings had suffered a loss of rents or income; that the Levitz store had no negative competitive effect on the other businesses in the Concord Center; that the design, appearance and usage of the Levitz facility had no undesirable impact on other properties and businesses in the Concord Center; and that the owners still possessed the right to restrict buildings or "control development" in the inverse area, since the owners' easements over the inverse area have not been extinguished.

Whatever effect Levitz has on the availability of parking space to appellants -- whether for actual parking or for hypothetical development -- that impact is the direct result of three factors, none of which is a product of this condemnation. First, Levitz's previous purchase of property in the Concord Center included the purchase of all the parking easement rights appurtenant to the land

bought by Levitz. Thus, Levitz bought the use of these parking spaces from appellants; it was not taken from them as a result of condemnation.

Second, Levitz's rights to use the parking spaces at issue, which it paid for when it bought its fee interest in the servient estate, are the same rights possessed by appellants. These rights are the creation of the Easement Agreement, which gives every owner of land the right to park in all of the Concord Center's parking areas.

Finally, the amount of parking "used up" by Levitz is a direct consequence of the City of Concord's parking ordinance as applied to the Concord Center's ownership and easement structure. As a general land use regulation applicable to all development, Concord's parking ordinance will result in a "taking" only if an owner's rights to beneficial use of his property are drastically curtailed. (Agins v. City of Tiburon (1979) 24 Cal.3d 266, affd. (1980) 447 U.S. 255.) Such is not the case here. The mere conjunction of the parking ordinance and the condemnation in this case does not convert an otherwise noncompensible regulation into a compensable one. (People ex rel. State Public Works Bd. v. Talleur (1978) 79 Cal.App.3d 690, 698; People ex rel. Dept. Pub. Wks. v. Curtis (1967) 255 Cal.App.2d 378, 383; County of Santa Clara v. Curtner (1966) 245 Cal.App.2d 730.)

Considering the evidence in the record in a light most favorable to respondent, and giving every intendment and presumption to the judgment of the trial court, we find that the record fully supports the judgment for the Agency on the cross-complaint in inverse condemnation.[2/]

VI

We do not agree with the Agency that the trial court should have granted its motion for judgment notwithstanding the verdict. This matter should be retried, with appellants given the opportunity to prepare and present to the jury evidence that specifically and unambiguously addresses the legitimate valuation question before the court: what was the amount of the diminution or depreciation in value of appellants' own separate, individual fee interests in the Concord Center, measured by a comparison of the fair market value of those parcels both before and after the taking. The evidence introduced by the Agency is not necessarily the only possible appraisal of those damages. Of course, any evidence sought to be introduced at the new trial of this matter must comply with the standard set forth herein, taking into account only the loss or damage to the dominant estates and not the benefits which may inure to the servient land underlying the easements as a result of the removal of those easements and the restrictions connected therewith.

---

2. Since we have already found that appellants' theory of valuation was faulty and legally inadmissible, we need not consider at length appellants' argument that they are entitled to compensation for the entire "inverse area" as part of their compensation for the actual take under a "pad theory" of analysis. That theory is inextricably bound up with appellants' invalid method of evaluating the take, and cannot be considered or admitted on retrial in any event.

The judgment is affirmed. Each party to bear its own costs.

CERTIFIED FOR PUBLICATION

Scott, Acting P.J.

We concur:

Feinberg, J.*

Barry-Deal, J.

* Assigned by the Chairperson of the Judicial Council.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 16 1984 MAY 16 1984

I have this day filed Order HEARING DENIED

MAY 17 1984

In re: 1 Civ. *No.* 53134

REDEVELOPMENT AGENCY OF THE CITY OF CONCORD

vs.

MICHAEL TOBRINER, et al.

Respectfully,

Clerk

877 8-82 4M * OSP

APPENDIX C

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE FIRST APPELLATE DISTRICT

DIVISION: 3

Merrill, Thiessen & Gagen
319 Diablo Rd #103
P O Box 218
Danville, CA 94526

REDEVELOPMENT AGENCY OF CONCORD
vs.
TOBRINER, MICHAEL ET AL
A013187 Old No. CIV53134
Contra Costa County No. 187464

* * REMITTITUR * *

I, CLIFFORD C. PORTER, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on March 21, 1984 and that this opinion or decision has now become final.

__Appellant __Respondent to recover costs
_x Each party to bear own costs
__Costs are not awarded in this proceeding

Witness my hand and the seal of the Court affixed at my office this May 25, 1984

Clifford C. Porter, Clerk

By: Walter G. Hays, Deputy

APPENDIX D

California Statutes

California Constitution, Article I, Section 19

Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.

Civil Code 1468

Each covenant, made by an owner of land with the owner of other land or made by a grantor of land with a grantee of land conveyed, or made by the grantee of land conveyed with the grantor thereof, to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, runs with both the land owned by or granted to the covenantor and the land owned by or granted to the covenantee and shall, except as provided by Section 1466, or as specifically provided in the instrument creating such covenant, and notwithstanding the provisions of Section 1465, benefit or be binding upon each successive owner, during his ownership, of any portion of such land affected thereby and upon each person having any interest therein derived through any owner thereof where all of the following requirements are met:

(a) The land of the covenantor which is to be affected by such covenants, and the land of covenantee to be benefited, are particularly described in the instrument containing such covenants;

(b) Such successive owners of the land are in such instrument expressed to be bound thereby for the benefit of the land owned by, granted by, or granted to the covenantee;

(c) Each such act relates to the use, repair, maintenance or improvement of, or payment of taxes and assessments on, such land or some part thereof, or if the land owned by or granted to each consists of undivided interests in the same parcel or parcels, the suspension of the right of partition or sale in lieu of partition for a period which is reasonable in relation to the purpose of the covenant;

(d) The instrument containing such covenants is recorded in the office of the recorder of each county in which such land or some part thereof is situated.

Where several persons are subject to the burden of any such covenant, it shall be apportioned among them pursuant to Section 1467, except that where only a portion of such land is so affected thereby, such apportionment shall be only among the several owners of such portion. This section shall apply to the mortgagee, trustee or beneficiary of a mortgage or

deed of trust upon such land or any part thereof while but only while he, in such capacity, is in possession thereof.

Code of Civil Procedure 657

The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at

the trial.

5. Excessive or inadequate damages.

6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.

7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the enter record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.

The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the

specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification or reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.

Code of Civil Procedure 1255.410

(a) At the time of filing the complaint or at any time after filing the complaint and prior to entry of

judgment, the plaintiff may apply ex parte to the court for an order for possession under this article, and the court shall make an order authorizing the plaintiff to take possession of the property if the plaintiff is entitled to take the property by eminent domain and has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article.

(b) The order for possession shall describe the property of which the plaintiff is authorized to take possession, which description may be by reference to the complaint, and shall state the date after which the plaintiff is authorized to take possession of the property.

(c) Notwithstanding the time limits for notice prescribed by Section 1255.450, if the court finds that the plaintiff has an urgent need for possession of property and that possession will not displace or unreasonably affect any person in actual and lawful possession of the property to be taken or the larger parcel of which it is a part, the court may make an order for possession of such property upon such notice, not less than three days, as the court deems appropriate under the circumstances of the case.

Code of Civil Procedure 1263.310

Compensation shall be awarded for the property taken. The measure of this compensation is the fair

market value of the property taken.

Code of Civil Procedure 1263.320

(a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

(b) The fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

Health and Safety Code 33320.1

"Project area" means an area of a community which is a blighted area, the redevelopment of which is necessary to effectuate the public purposes declared in this part, and which is selected by the planning commission pursuant to Section 33322.

Health and Safety Code 33368

The decision of the legislative body shall be final and conclusive, and it shall thereafter be conclusively presumed that the project area is a blighted area as defined by Section 33031 through 33034 and that all

prior proceedings have been duly and regularly taken.

Health and Safety Code 33501

An action may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Civil Procedure to determine the validity of bonds and the redevelopment plan to be financed or refinanced, in whole or in part, by the bonds, or to determine the validity of a redevelopment plan not financed by bonds, including without limiting the generality of the foregoing, the legality and validity of all proceeds theretofore taken for or in any way connected with the establishment of the agency, its authority to transact business and exercise its powers, the designation of the survey area, the selection of the project area, the formulation of the preliminary plan, and the adoption of the redevelopment or renewal plan, and also including the legality and validity of all proceedings theretofore taken and (as provided in the bond resolution) proposed to be taken for the authorization, issuance, sale and delivery of the bonds and for the payment of the principal thereof and interest thereon.

Code of Civil Procedure 860

A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, being an action in the superior court of the county in which the principal office of the public agency is

located to determine the validity of such matter.

Code of Civil Procedure 863

If no proceedings have been brought by the public agency pursuant to this chapter, any interested person may bring an action within the time and in the court specified by Section 860 to determine the validity of such matter.

Code of Civil Procedure 870

the judgment, if no appeal is taken, or if taken and the judgment is affirmed, shall ... thereupon become and thereafter be forever binding and conclusive, as to all matters therein adjudicated on which at the time could have been adjudicated, against the agency and against all other persons, and the judgment shall permanently enjoin the instituting by any person of any action or proceeding raising any issue as to which the judgment is binding and conclusive.

APPENDIX E

37988

GRANT OF EASEMENTS AND PARKING AGREEMENT

THIS AGREEMENT is made this 23 day of May, 1956, by and among CONCORD INVESTMENTS, a California corporation, hereinafter designated "First Party", ARTHUR WEISBERG and MILDRED C. WEISBERG, his wife, hereinafter designated "Second Parties", and ERICKSON, PHILLIPS & WEISBERG, a California corporation, hereinafter designated "Third Party", in reference to the following facts:

Annexed hereto, marked Exhibit "A" and made a part hereof, is a legal description of the Concord Shopping Center.

Annexed hereto, marked Exhibit "B" and made a part hereof, is a plat of said Concord Shopping Center.

Second Parties are the owners of that portion of said Concord Shopping Center which is designated "Parcel A" on said Exhibit "B:" and is more particularly described in Exhibit "C" annexed hereto and made a part hereof.

Third Party is the owner of that portion of said Concord Shopping Center which is designated "Parcel B" on said Exhibit "B" and is more particularly described in Exhibit "D" annexed hereto and made a part hereof.

First Party is the lessee under that certain lease dated the 3rd day of February, 1956, wherein Genesio Bisso and Albina Bisso, his wife, and George L. Bisso and Julie A. Bisso, his wife, are lessors of that portion of said Concord Shopping Center which is described in Exhibit "E" annexed

hereto and made a part hereof.

First party is the lessee under that certain lease dated the 15th day of August, 1955, wherein Hilary A. Belloc, as Guardian of the estate of Katie A. Bartneit, is lessor of that portion of said Concord Shopping Center which is described in Exhibit "F" annexed hereto and made a part hereof, for a term of ninety-nine (99) years commencing on said 15th day of August, 1955.

First Party is the owner of the balance of said Concord Shopping Center.

The parties hereto desire to allocate that portion of said Concord Shopping Center which is delineated by horizontal, vertical and diagonal lines on said Exhibit "B" as a common area for the use of the parties hereto and all of their lessees, lessees' subtenants, agents, employees, customers, or other licensees in said Concord Shopping Center as it now exists or as it may hereafter be enlarged, and to agree upon the use and operation of all said property to the extent hereinafter stated.

NOW, THEREFORE, in consideration of the premises and the covenants and conditions hereinafter contained, the parties hereto do hereby agree as follows:

1. Each of the parties hereto hereby grants to the others, for the benefit of their respective properties above described or identified, a non-exclusive easement for the purpose of ingress and egress for pedestrians and automobiles and for automobile parking purposes over and upon the property of each other, except where buildings are located or proposed to be located as shown on said Exhibit "B". (It is recognized by the parties hereto that

there are sidewalks adjacent to the existing buildings in said Concord Shopping Center and that the future buildings to be constructed therein will have sidewalks adjacent thereto.) Said easements shall be appurtenant to said properties to be benefited thereby and a burden upon said properties over and upon which said easements are hereby granted, and shall be perpetual as to the properties owned by the parties hereto, and as to each of the properties leased by First Party, as lessee, as aforesaid, the easements hereby granted by First Party to Second Parties and Third Party over each of said properties shall be for the duration of the term of each said leases or any extensions or renewals thereof, unless First Party acquires title to either or both of said parcels or property leased by it, as lessee, as aforesaid or unless all or any of the stockholders of First Party or any corporation in which any of them individually or collectively have a majority interest acquires such title in any of which events the easements hereby granted by First Party to Second Parties and Third Party over and upon the said properties so acquired shall become perpetual concurrently with the acquisition thereof. Said easements are also granted for the express benefit of the respective lessees who may now or hereafter lease from any of the parties hereto any property in said Concord Shopping Center, and may be enforced by any of such lessees.

2. Each of the parties hereto agree that no buildings or other structures shall be erected on his or its property occupying more area or in a different location than as shown on Exhibit "B" as a building or building site

nor shall any service station be erected in said Concord Shopping Center other than on the building site located at the corner of Market Street and Willow Pass Road as shown on said Exhibit "B".

3. Each of the parties hereto agrees not to erect, place or maintain, or permit the continued existence of any fences, curbs, or other obstructions of any nature whatsoever on his or its property so as to interfere with the use of the entire parking area shown on said Exhibit "B" as a unit.

4. First Party, shall at its own cost and expense, install sidewalks, curbs, drains and sewer facilities, and grade, level and blacktop, or similarly surface, the parking area shown on Exhibit "B" to the East of the Westerly boundary line and to the North of the Northerly boundary line of Parcel "A" as shown on said Exhibit "B", and light and mark the same prior to November 1, 1956, and First Party shall, at its own cost and expense, install sidewalks, curbs, drains and sewer facilities, and grade, level and blacktop, or similarly surface, the balance of the parking area shown on said Exhibit "B", and light and mark the same prior to the date of the opening for business of the buildings to be constructed by First Party on its two building sites immediately west of said "Parcel A" as shown on Exhibit "B". First Party shall at all times maintain said drains and sewer facilities and the surface of the parking area and the markings and lighting thereof and keep the same in good condition and repair and as clean as reasonably possible, and carry public liability and property damage insurance covering said parking area, sidewalks

and curbs in the joint names of the parties hereto.

5. Said parking area shall at all times be available for use in common by the parties hereto, their Lessees, Lessees' subtenants, agents, employees, customers, or other licensees of all buildings in the Concord Shopping Center as it now exists or as it may hereafter be enlarged.

6. Second parties and third party each agree to pay to First Party monthly, after the completion of the building or buildings on their respective parcels and the occupancy thereof by tenants, for maintaining, lighting, cleaning and insuring the entire parking area, one-fourth (1/4) of one per cent (1%) of the amount of gross sales on their respective parcels of any tenant whose rental is on a percentage basis (the term "gross sales" as used herein shall mean the gross sales as that term is defined in the leases of the tenants of said buildings or any portion thereof), and one cent (1¢) per square foot of ground floor area per month of any tenant whose rental is not on a percentage basis, provided, however that should Second Parties or Third Party in any case include within the terms of any lease of any space within their respective properties provisions whereby the tenant in such lease undertakes to pay to Second Parties or Third Party as the case may be for the purposes herein stated the one-fourth (1/4) of one (1) per cent of gross sales, or the one cent (1¢) per square foot of area payments covering the tenants leased space, then Second Parties and Third Party, as the case may be, shall have no obligation to pay any amount to First Party under the terms of this paragraph numbered "6", and based upon such tenant's sales or occupancy unless and until such

tenant actually pays such amount to and the same is actually received by Second Parties or Third Party as the case may be. The amount to be paid per square foot in case that is the basis of payment may be adjusted every tenth (10th) year at the instance of First Party to cover First Party's actual costs at the aforesaid time, on condition that First Party furnishes Second Parties and Third Party with evidence that said one cent (1¢) per square foot is less than the actual cost per square foot of maintaining, lighting, cleaning and insuring said parking area as a whole, in which event the cost per square foot to Second Parties and Third Party shall be increased by an amount sufficient to meet said actual cost, subject, however, to the same limitation with respect to actual payment to Second Parties or Third Party as the case may be, by their tenant or tenants. First Party shall not be required to account to Second Parties or Third Party for the expenditure of said money. The obligations imposed in this paragraph "6" upon Second Parties or Third Party during such time as First Party or First Party's successor shall fail to perform the obligations imposed upon First Party in Paragraph "4" hereof. Second Parties and Third Party agree to forthwith take all steps necessary to collect any sums due from any of their tenants for the purposes herein stated, and in the event Second Parties or Third Party fail to do so, First Party shall have the right to enforce payment thereof, including expenses of such action, from such tenant or tenants in behalf, and in the name of Second Parties and/or Third Party, as the case may be.

7. All sewer, water, gas, electric power and telephone installations within or serving the Concord Shopping Center shall be available for use by Second Parties and Third Party, and each shall have the right to connect, at his or its own cost and expense and without any charge being made by First Party, sewer, water, gas, electric power and telephone lines or conduits serving their respective properties to said utility installations. The aforesaid sewer, water, gas, electric power and telephone lines or conduits shall be made available to Second and Third Parties adjacent to the sidewalk area of their respective buildings or building sites as shown on Exhibit "B".

8. The parties hereto agree to require their employees and those of their tenants of any building or buildings erected by them in the Concord Shopping Center, to park their automobiles in such area or areas within the parking area as First Party may designate.

9. Nothing herein contained shall be deemed to be a gift or dedication, in any way, of any portion of the property described in Exhibit "A" to the public, or for any public purposes whatsoever, it being the intention of the parties hereto that this agreement shall be strictly limited to and for the purposes herein expressed.

10. No breach of this agreement shall entitle any party hereto to cancel, rescind, or otherwise terminate this agreement, but such limitation shall not affect in any manner any other rights or remedies which the parties hereto may have hereunder by reason of any breach of this agreement. This agreement may not be terminated, in

whole or in part, either by mutual agreement of the parties hereto, or otherwise, nor may any provision of this agreement be stricken or modified without the prior written consent of all lessees who are at the time lessees of property as described in said Exhibit "A", it being agreed that this agreement is made for the express benefit of the parties hereto and all such lessees.

11. Second parties shall have the right to construct a building or buildings upon the building site delineated in "Parcel A" on said Exhibit "B" which building or buildings shall not be in excess of one and one-half (1-1/2) stories (said limitation shall be for a period of fifty-five (55) years from the date of this agreement). Said building or buildings shall conform generally in design to other buildings erected by First Party in said Concord Shopping Center. Second Parties agree not to permit a bank to be operated on said "Parcel A" on or before October 27, 1957. In no event shall Second Parties permit a department store to be operated on said "Parcel A". "Department store" as used herein shall be defined for the purposes of this agreement as embracing in scope and extent the department store operation being carried on in Oakland, California, as of the date of this agreement by Western Department Stores, a corporation.

12. Third party shall have the right to construct a building or buildings upon the building site delineated in "Parcel B" on said Exhibit B", which building or buildings shall not be in excess of one and one-half (1-1/2) stories (said limitation shall be for a period of fifty-five (55) years from the date of this agreement). Said building or build-

ings shall conform generally in design to other buildings erected by First Party in said Concord Shopping Center. Third Party agrees not to permit a bank to be operated on said "Parcel B" on or before October 27, 1957. In no event shall Third Party permit a department store, as herein defined, to be operated on said "Parcel B".

13. All covenants of the parties hereto are expressly declared to be binding upon the heirs, executors, administrators, successors and assigns of the respective parties thereto, ad are and shall be appurtenant to and run with the real property described in Exhibit "A" hereto and each and every part thereof.

Following the same of any of the real property owned by any of the parties hereto, the covenants herein contained shall be binding upon the purchaser of said property, his or its heirs, executors, administrators, successors an assigns, and the selling party shall be released from his or its covenants in connection with said property so sold, provided the purchaser thereof assumes in writing with his or its signature thereon duly acknowledged, the selling party's obligations hereunder insofar as they apply to said property so sold and said writing is recorded in the office of the County Recorder of Contra Costa County, State of California.

IN WITNESS WHEREOF the parties hereto have executed this agreement the day and year first above written.

CONCORD INVESTMENTS

By Sam Sankowich
Its President

By Theodore Rhodes
Its Secretary

FIRST PARTY

Arthur Weisberg
Mildred C. Weisberg

SECOND PARTIES

ERICKSON, PHILLIPS & WEISBERG

By Arthur Weisberg
Its President

R___ W. Phillips

THIRD PARTY

TENANTS - BUILDING "B"

1. WALGREEN'S DRUG STORE
2. DO-NUT SHOP
3. FIRESIDE SECURITIES
4. OPTOMETRIST
5. STATIONERY SHOP
6. JEWLERY SHOP
7. TOY SHOP
8. CURTAIN SHOP
9. JAY VEE
10. GALLENKAMP'S
11. BANK (TEMPORARY)
12. SHOE REPAIR
13. BARBER
14. ~~LAUNDERETTE~~

APPENDIX F - PARTIAL SITE PLAN

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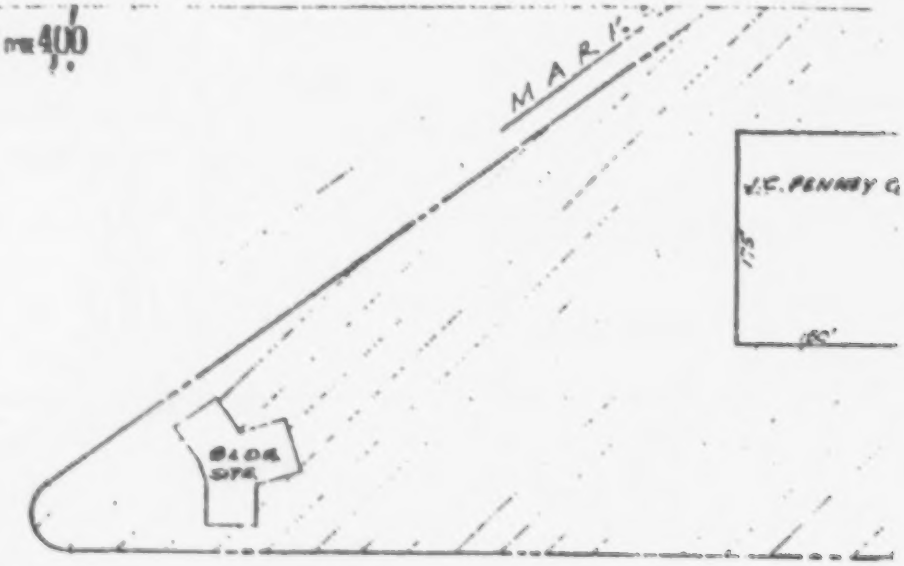
2733 mc 400



LEGEND

PARKING

PARKING

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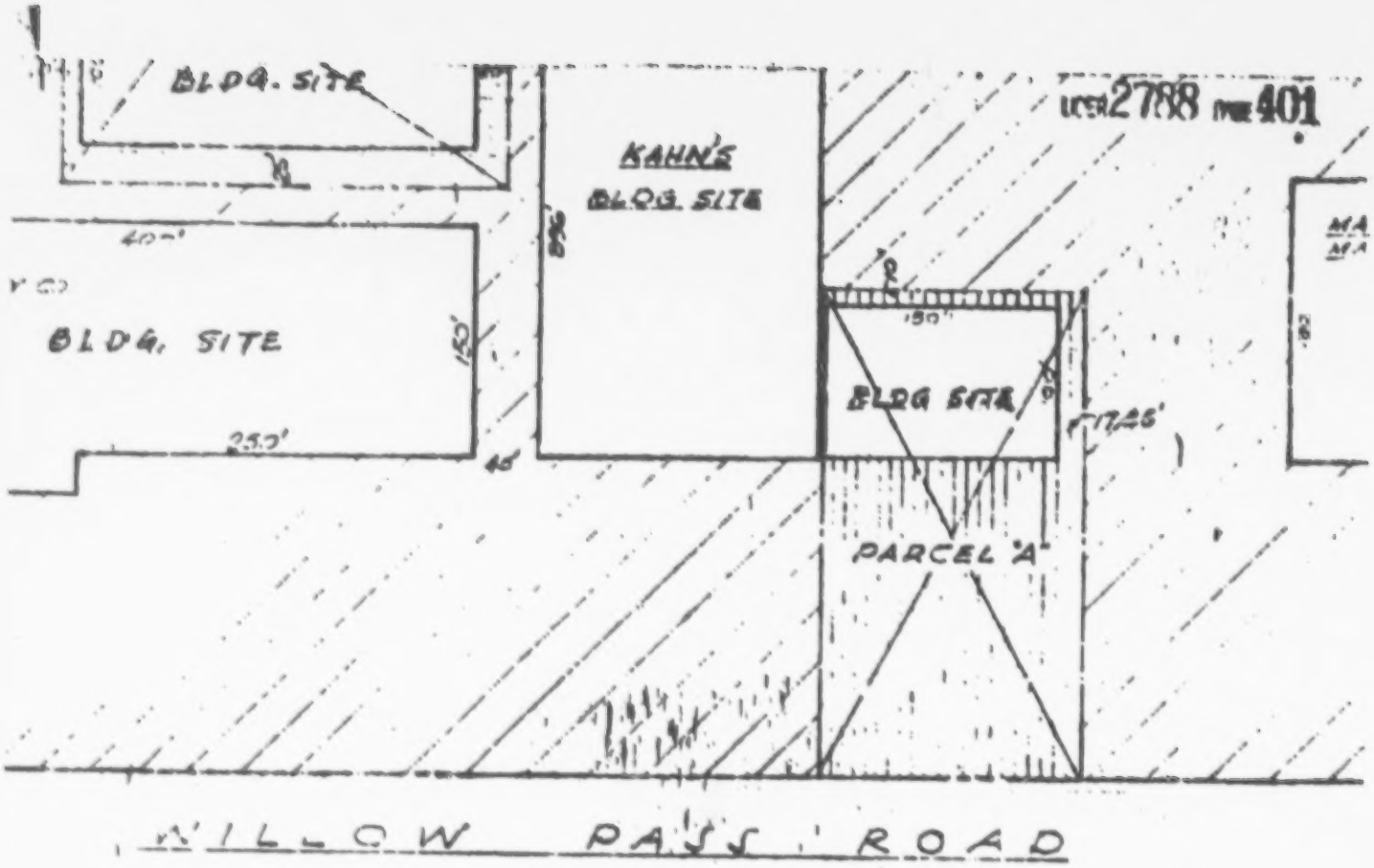

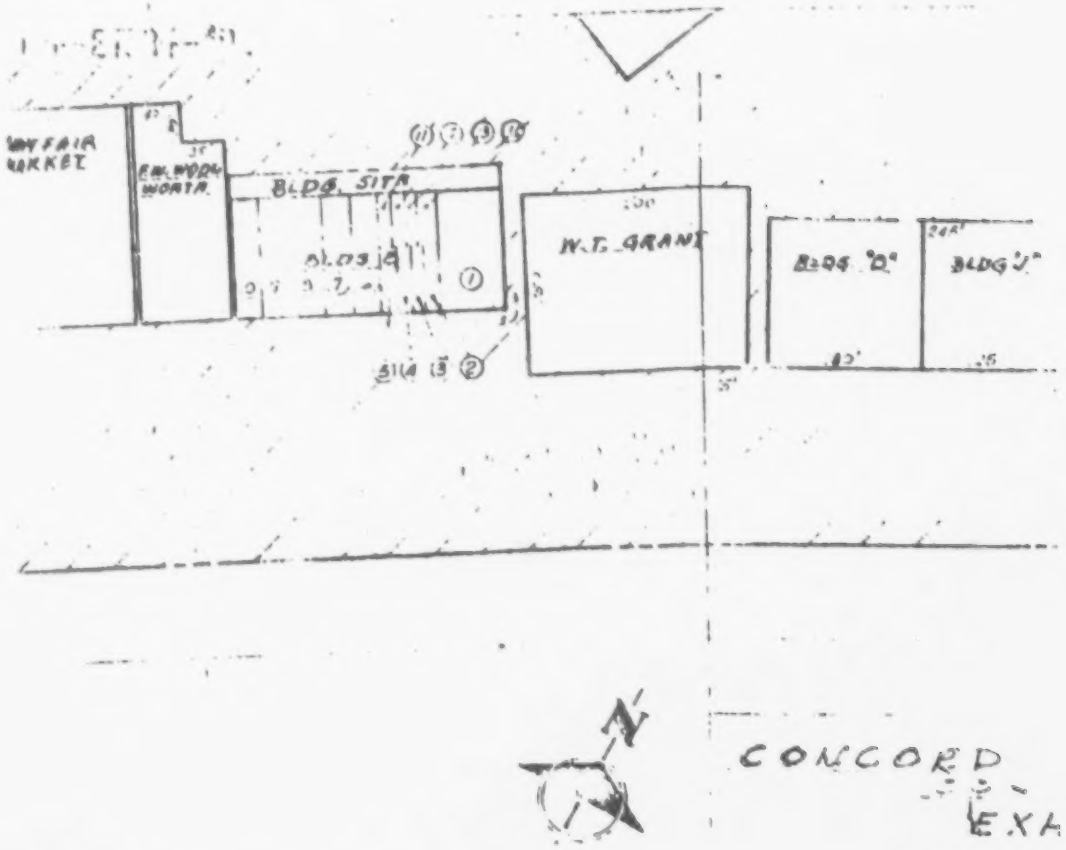

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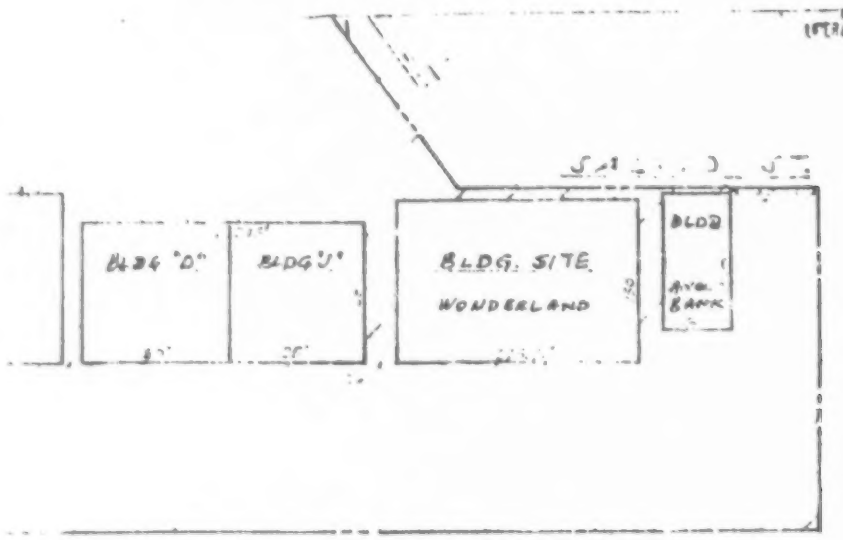

SHOPPING CENTER

EXHIBIT "A" dated and

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No. 84-204

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MICHAEL TOBRINER, *et al.*,
Petitioner,

VS.

REDEVELOPMENT AGENCY OF THE CITY OF CONCORD
Respondents.

On Petition for a Writ of Certiorari To the California Court of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari in this Court to review the decision of the California Court of Appeal which upheld the trial court's order granting a motion for new trial made by the Redevelopment Agency of the City of Concord, California ("Agency"). The California Supreme Court denied review of the Court of Appeal decision. This case is an eminent domain proceeding in which the Agency is condemning existing parking easements and related rights over an unused portion of a shopping center parking lot so as to allow extinguishment of the easements and con-

struction of a building on the parking lot. The easements ran in favor of the tenants and owners of various parcels of land (or dominant tenements) in the shopping center.

The rights taken were created by three recorded documents, one of which, entitled "Grant of Easements and Parking Agreement," is attached to the Petition for Writ of Certiorari as Appendix E. The rights created under those agreements are appurtenant to the individual dominant tenements in the shopping center. The Agency is not condemning the land underlying the easements (the servient tenement). Rather, the Agency brought this action in order to allow the owner of the underlying land to develop it and put it to more productive use.

The dispute in this case has centered on the manner in which the taken easement and related rights are to be valued. The trial court and the California Court of Appeal, in upholding the trial court, both followed well-established judicial rules and held that the value of the easements and related rights is to be measured by the decrease or diminution in value of the dominant tenement as a result of the taking. The Petitioners have, on the other hand, made the novel argument that they are entitled to compensation based on the value of the land underlying the easement (or servient tenement).

The Petitioners seek a hearing here on the grounds that the federal Constitution requires that this court create a uniform rule that easements and related rights which are condemned be valued based on the value of the underlying land. As Part II of this brief indicates, there already is a uniform rule, conforming to constitutional standards, for valuation of easements and related rights. That rule was

followed by the California Court of Appeal in this case. Therefore, even if one accepts Petitioners' contention that such a national uniform rule is necessary, such a rule already exists and is contrary to Petitioners' position here.

The Petitioners also seek review of the lower courts' decision in this case regarding the "blight" aspects of the public purpose for the condemnation. However, as we point out below, Petitioners are precluded from challenging the findings of blight made in connection with adoption of the Agency's redevelopment plan because they failed to challenge those findings within the constitutionally valid limitations period provided under California law. Even if they were not so precluded, there is no doubt in this case that there is a proper and justifiable public purpose for the condemnation.

II

ARGUMENT

A. The Valuation Issues in This Case Do Not Require This Court's Action to Secure Uniformity

The thrust of Petitioners' appeal to this Court is that there is a need for national uniformity with regard to standards for valuation of the type of property interests taken in this case.

The reality, however, is that there already is national uniformity regarding valuation of the interests taken here, as best evidenced by Petitioners' inability to cite a single case of any federal or state court which is at odds with the opinion of the California Court of Appeal in this case. The reality is that what Petitioners truly seek here is adoption of an unprecedented and unjustified rule of valuation which

is not constitutionally mandated and which has never been and should never be adopted by any court.

This Court, the courts of California and other states and the Restatement of Property have firmly established a rule of valuation that, when appurtenant easements are taken, compensation is to be measured by the diminution in value of the dominant tenement as a result of the taking. *United States v. Welch,* 217 U.S. 33 (1910); *Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189 (1910); *Hemmerling v. Tomlev,* 67 Cal. 2d 572 (1967); Restatement of Property Section 508.

Contrary to Petitioners' statements in their petition, there is no suggestion in the opinion of the California Court of Appeal or in any of the other cases considering existing appurtenant easements that valuation is to be based on anything other than principles of just compensation as measured by fair market value, considered in light of what a willing buyer would pay to a willing seller. Thus, if property with access to the public roads via an access easement has a fair market value of $100,000, and that property will have a fair market value of only $75,000 if that access easement is condemned, then the diminution in value of the property as a result of the elimination of the access easement is $25,000. The diminution in value is based on the fair market value of the property before and after the condemnation.

To avoid the inevitable conclusion that the California Court of Appeal applied the correct and well-established rules for valuation of easements, Petitioners point to the covenants in the Grant of Easements and Parking Agreement (Appendix E to the Petition for Writ of Certiorari)

which restrict use of the land burdened by the parking easement. Then, by wild analogy to *Penn Central Transportation Company v. New York City,* 434 U.S. 104 (1978), Petitioners claim that the combination of an easement and a restriction on use requires a different method of valuation than set forth by the California Court of Appeal because such a combination somehow gives Petitioners the right to develop the land which was subject to the easement and restriction.[1]

This contention does not add anything to Petitioners' plea. Petitioners do not own the land which was, prior to this taking, subject to the easement and restriction. And there is nothing in the Grant of Easement and Parking Agreement which even remotely suggests that Petitioners have the right to purchase, own or develop that land. That agreement establishes the parking easements as "perpetual," contains no provisions relating to economic or planning aspects of developing the parking lots and requires the unanimous consent of the approximately 150 owners and tenants in the shopping center to amend the agreement. See Appendix E to Petition for Writ of Certiorari at Paragraphs 1, 10. The Grant of Easement and Parking Agreement was quite clearly intended to preserve the parking areas for parking and to perpetually prevent development of those parking areas by Petitioners, the fee owner, or anyone else. Unless this Court is prepared to create an entirely new and previously unheard of form of property which somehow is created when an easement and a use

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[1]The *Penn Central* case does not involve condemnation of existing easements or restrictions, and the "development rights" discussed in that case do not arise from the presence of easements or restrictions.

restriction exist in tandem, the presence in this case of both an easement and a use restriction does not give rise to "development rights" of the sort Petitioners claim.

Moreover, the fact that there is a use restriction in combination with the easement does not alter the applicable rules for valuation of what has been taken in this case. The California Court of Appeal followed the rule of every jurisdiction in this nation regarding valuation of existing building restrictions, that "the owner of the land for whose benefit the restrictions were imposed is entitled to compensation for damage to the dominant estate, measured by the diminution in value of that property as a result of the taking. Thus, if a building restriction is taken, compensation is measured, as in the case of an easement, by the damage to the dominant tenement resulting from the loss of the restriction." Appendix A to Petition for Writ of Certiorari at 11.

Every court which has considered this valuation question has concluded that compensation is to be measured by the decrease in value of the benefitted property due to the condemnation of the restriction. See *United States v. Certain Land in City of Augusta,* Maine, 220 F.Supp. 696 (D. Me. 1963); *Town of Stanford v. Vuono,* 108 Conn. 359, 143 A. 245 (1928); *Horst v. Housing Authority of Scots Bluff,* 184 Neb.215, 166 N.W.2d 119 (1969); *Meredith v. Washoe County School Dist.,* 84 Nev. 15, 435 P.2d 750 (1968); *State v. Orenstein,* 124 N.J. Super. 295, 306 A.2d 479 (1973); *School Dist. No. 3 v. Country Club of Charleston,* 241 S.C. 215, 127 S.E.2d 625 (1962).

Whether the taken property rights are considered as easements, restrictions, or both, it is clear that the proper

and uniformly followed measure of value when such rights are taken is the decrease in value of the dominant tenement. There is no need, therefore, for this Court to act to secure uniformity.

B. The Acquisition Was for A Proper Public Purpose and Did Not Violate Due Process of Law

Petitioners also challenge the statute of limitations set forth in California Health & Safety Code Section 33501 as a violation of due process of law. That section is part of the California Community Redevelopment Law, a comprehensive legislative scheme for planning and implementing redevelopment of blighted areas. California Health & Safety Code Sections 33000-33855. Under the California law, a redevelopment agency formulates and then implements a plan to eliminate blighting physical, social and economic influences. Prior to adoption of the plan, a public hearing is held. California Health & Safety Code Sections 33348, 33360. Prior to the public hearing, every owner of property in the area governed by the plan must receive written notice of hearing and notice that his or her property may be subject to acquisition by eminent domain. California Health & Safety Code Sections 33349, 33350.

The redevelopment plan and the findings made in connection with its adoption must be challenged within sixty days of the adoption of the redevelopment plan. California Health & Safety Code Section 33501. This statute of limitations is necessary in order to insure that the plan can be implemented in a rational and comprehensive manner. If the plan could be challenged several years after it was adopted, it would be extremely difficult to finance and implement the plan, because the redevelopment agency would

always run the risk that the project would be disrupted by a later court challenge of the plan. The redevelopment agency would be unable to make or obtain the long term financing and construction commitments necessary to carry out a comprehensive redevelopment plan, if those commitments could be subsequently undercut by later challenges to the plan.

The legislative scheme under the California redevelopment law is one in which the public use issues of blight must be challenged at the time the determinations regarding blight are made at the time the redevelopment plan is adopted.[2] *In re Redevelopment Plan for Bunker Hill,* 61 Cal.2d 21, 37-42 (1964). The statutory scheme is one which afforded Petitioners and others in their position with reasonable and adequate notice, hearing, and judicial review rights before the redevelopment plan was adopted and implemented. In these circumstances, the sixty-day statute of limitations on judicial challenges to the redevelopment plan and the findings made in connection with its adoption does not violate constitutional guarantees of due process of law. See *Logan v. Zimmerman,* 455 U.S. 422, 437 (1982); *Electrical Workers v. Robbins & Meyers, Inc.,* 429 U.S. 229, 243-44 (1976); *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945); *Yakus v. United States,* 321 U.S. 414, 425-36 (1944).

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[2]The sixty-day statute of limitations does not preclude later claims that the redevelopment plan is not being implemented in the manner contemplated by the plan. *Redevelopment Agency v. Herrold,* 86 Cal.App.3d 1024 (1978). In addition, before a redevelopment agency can bring an eminent domain action, it must give the prospective condemnee a hearing at which the condemnee may urge that his or her property not be taken. California Code of Civil Procedure Section 1245.235.

Moreover, even if we assume that Petitioners' "property" in the redevelopment area cannot be considered blighted, it does not mean that there is no public use in this case. If a blighted area is to be redeveloped in an effective and integrated manner, it is often necessary to include in the redevelopment area and subject to redevelopment some individual parcels which may not be blighted. California Health & Safety Code Section 33321 specifically authorizes inclusion of unblighted property in a redevelopment area so long as blighting conditions predominate in the area. The courts have upheld this inclusion of unblighted property in redevelopment areas, recognizing that such inclusion is often necessary if redevelopment is to be successful. *Berman v. Parker,* 348 U.S. 26, 35 (1954); *In re Redevelopment Plan for Bunker Hill,* 61 Cal.2d 21, 49-50 (1964). In addition, it is undisputed that the property burdened by the taken easements was an unsightly and unused parking lot at the time the redevelopment plan was adopted and remained in that state at the time this action was commenced.

Petitioners' claim that a condemnation of this type is not for a public purpose has been decisively rejected by prior decisions of this Court. In *Berman v. Parker,* supra, this Court made clear that the redevelopment process, including the exercise of the power or eminent domain to forward a redevelopment project, is invested with sufficient public purpose to withstand constitutional challenge. And in *Hawaii Housing Authority v. Midkiff,* ..... U.S. ....., 104 S. Ct. 2321 (1984), this Court made clear that the courts should give broad deference to legislative judgments regarding the public purpose for exercise of the power of eminent domain.

In this case, the Agency found that the economic and physical condition of the shopping center would be served by the elimination of outdated easements and restrictions which served only to preserve unused and unsightly parking lots. The Agency's decision is not one "palpably without reasonable foundation." *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. at 2329. Thus, even if Petitioners could succeed in avoiding the statute of limitations in the California redevelopment law, there still would be no basis for claiming that this condemnation lacks sufficient public purpose under the Constitution. Because there is no serious issue regarding the public purpose for the taking, this is not a case which demands this Court's attention.

III

CONCLUSION

For the reasons stated above, the Respondent, Redevelopment Agency of the City of Concord, urges the Court to deny the Petition for Writ of Certiorari.

Dated: September 5, 1984

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